

copyright definition of "program related" material.^{21/} The statute clearly and properly reflects a limit on cable operators' carriage obligations regarding non-program related material.^{22/}

J. Existing Technical Rules Meet Must Carry Requirements

The NPRM references the provisions of the 1992 Act regarding signal quality and asks whether the Commission's existing technical standards adequately address these matters. TCI submits that the Commission's current technical regulations do, in fact, satisfy the new statutory requirements and properly ensure that broadcast signals are carried without material degradation.^{23/}

The Commission should clarify that must carry stations are obligated to accept existing circumstances. If the station

^{21/} See WGN Continental Broadcasting v. United Video, 51 R.R.2d 1617, 1621 (7th Cir. 1982). (The VBI programming must be "intended to be seen by the same viewers as are watching the [primary program] during the same interval of time in which that [primary program] is broadcast, and as an integral part of the [primary] program.")

^{22/} Notwithstanding the different treatment of "signal enhancements" in the two statutory provisions, logic dictates that cable operators be allowed to eliminate and then replace signal enhancements.

^{23/} This does not mean that all broadcast signals will necessarily be delivered at the same quality as satellite signal. If the broadcast signal arrives with inferior quality, that disparity may remain in the subsequent retransmission to subscribers. The Commission has already recognized this principle in its technical standards. Report & Order, 7 F.C.C. Rcd. 2021, 2024 (1992).

does not deliver the requisite signal strength to the cable headend, it is the station's obligation to bear all of the costs (including administrative costs) required to improve the signal. These could include, among other things, improved antennas, increased tower height, microwave relay equipment, and amplification equipment. The parties should be held to good faith cooperation in finding a solution, but all of the costs must be borne by the station.

K. The Calculation Of Activated Channels Should Exclude Channels Which Would Require Additional Expenditures To Be Delivered To Subscribers

A cable operator's must carry obligations vary depending on its number of "activated channels." The NPRM proposes to adopt the definition of "activated channels" set forth in the 1992 Cable Act. Section 2(c)(5) defines "activated channels" as "those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers the cable system, regardless of whether such services actually are provided" 47 U.S.C. § 522(1). TCI has no objection to incorporating this statutory definition into the Commission's regulations, but urges the Commission to clarify the definition to avoid future controversy.

The definition at issue was first used in the 1984 Cable Act to determine the number of channels a cable operator must make available for commercial leased access.

See 47 U.S.C. § 522. The FCC originally suggested a rather broad interpretation. In Sierra East Television, Inc. v. Western Cable Television, Inc., 776 F. Supp. 1405 (E.D. Ca. 1991), however, a federal district court advanced a narrower, more practical interpretation. After reviewing the legislative history,^{24/} the court concluded that activated channels referred only to "channels actually delivered to subscribers but carrying no programming ('dark channels')." Id. at 1413. It distinguished between dark (but "activated") channels and channels that could be delivered to subscribers only with some additional engineering or equipment. The decision notes that "[N]owhere . . . is there a suggestion that cable operators are under an affirmative duty to engineer, 'grow,' or develop their cable system at any time or in any manner." Id.

The potential burden of meeting must carry requirements and the rapid advancements in cable technology make it imperative that the Commission adopt the interpretation of "activated channels" advanced in Sierra East. The Commission should make clear that an "activated channel" is one that can be delivered to

^{24/} The 1984 Committee Report explained, "The term [activated channels] is used to distinguish between channels which are not being used -- that is, dark channels . . . and channel capacity which the cable system might at sometime in the future be capable of delivering, but is potential channel capacity that is not presently delivered to subscribers." H. Rep. No. 934, 98th Cong., 2d. Sess. at 49, reported in 1984 U.S. Code Cong. & Ad. News, 4655, 4686.

subscribers without the need for additional equipment. That restriction must apply to any equipment, regardless of whether it is needed at the system headend, in the transmission or distribution portion of the plant, or at the subscriber's house. It requires that each system be measured according to its "lowest common denominator." For example, a system that has distributed 36 channel converters must be treated as a 36 channel system, regardless of how the remainder of the physical plant is engineered. A contrary finding "would impermissibly compel [the cable operator] to incur costs for additional equipment and engineering." Id. Surely Congress (concerned as it was with cable pricing) did not intend operators to undertake substantial capital expenditures to comply with this Section.

L. Cable Operators Should Independently
Resolve Channel Positioning Conflicts

The 1992 Cable Act's channel positioning provision presents two distinct areas of potential dispute: (1) where broadcasters have conflicting statutory claims to the same channel; and (2) where broadcasters and cable operators must mutually agree to an alternative channel assignment. While the Commission is the appropriate forum to resolve these disputes and is given statutory authority to do so, it should rely heavily on the cable operator's independent judgment. Cable operators are in the best position to work with the stations involved to fashion a compromise that will maximize subscriber satisfaction. The Commission

simply does not have the resources to arbitrate every channel positioning dispute around the country. In fact, the Commission should intercede only where the broadcaster demonstrates that a cable operator did not pursue a resolution in good faith.

To assist cable operators in administering this area, the Commission should articulate three ground rules:

1. Where broadcasters present conflicting statutory demands, the operator should ordinarily assign channels with the following priorities:

- (1) off-air channel
- (2) January 1, 1992 assignment^{25/}
- (3) July 19, 1985 assignment

2. The placement of must carry stations on the basic service tier is paramount to any channel positioning request. For example, if an operator chooses to offer its basic service on channels two through thirteen, every broadcaster must limit their channel selection to that band, notwithstanding the fact that their off-air and previous cable assignments were at some higher channel.^{26/}

^{25/} Applicable only for commercial stations.

^{26/} Broadcasters must, in fact, conform their channel requests to existing operating restraints. An operator cannot be expected to remove "traps" that block reception of certain cable channels simply because the broadcaster has a claim to one of those channels.

This outcome is critical to a sensible resolution of channel positioning requests. Any other approach could burden cable operators with difficult, if not insurmountable, technical problems, which would lead to an intolerable increase in costs and confusion for the consumer.

3. A broadcaster has no right to any particular channel assignment, other than those specifically identified in the statute. Congress could have allowed broadcasters to select from among every cable channel, and instead adopted a more limited approach. The Commission should not impose any additional channel positioning obligations on cable operators.^{27/}

M. Notice And Timing Restrictions On
Channel Changes And Deletions
Should Be Sensibly Interpreted

TCI does not oppose the suggestion in the NPRM that a 30-day subscriber notice requirement be made applicable to any deletions or repositioning of commercial or non-commercial stations. The Commission should, however, expressly preempt any other notification requirements. TCI is particularly concerned that a longer notification period would make it extremely difficult, if not impossible, to meet new must carry/retransmission consent obligations.^{28/}

^{27/} While cable operators may consider a broadcaster's request for a uniform channel assignment within its market, the consideration was not expressly identified in the statute and cannot be required.

^{28/} The notification requirement should be waived in certain cases involving retransmission consent. See Section II, M, infra.

The NPRM also requests comment on the prohibition of deletion or repositioning during ratings periods. Congress could only have meant the four "sweeps" conducted during February, May, July, and November. If the Commission were to extend the prohibition literally to whenever there are any ratings, cable operators would never be able to delete or reposition signals, since ratings in some form are always occurring. In order to meet the principles stated above, especially that of administrative ease and maximum discretion for cable operators, the prohibition must be limited to the four "sweeps" periods.^{29/}

N. The Commission Should Attempt To Limit Its Role As The Mediator Of Must Carry Disputes

The Act directs the Commission to consider and act on complaints brought by commercial and non-commercial stations dissatisfied with the manner in which a particular cable operator has met its must carry obligations. The Commission need not, however, feel obliged to step into every squabble between a cable operator and a disappointed broadcaster. The Commission simply should not put itself into the position of second guessing an operator's routine carriage decisions. To minimize this problem, the Commission should afford cable operators substantial

^{29/} The prohibition should apply only to signal changes made "during" a "sweeps" period, and not changes made at the beginning of such a period. Because copyright accounting begins anew for the second half of the year in July, operators must often make signal changes between June and July.

deference. It should declare that as long as an operator's decision is not "arbitrary and capricious" it will be upheld. Carriage decisions (including channel positioning) should not be reversed unless it is shown that the operator acted in bad faith or clearly misinterpreted governing law.

On a procedural note, the proposal that cable operators be given just ten days to respond to a broadcaster complaint filed at the Commission should be rejected as unduly burdensome. A thirty-day response period is more appropriate and in line with other Commission complaint procedures. (See Section §1.724).

O. The Commission's Existing Program
Exclusivity Rules Should Be Modified
To Reflect New Must Carry Obligations

The NPRM inquires as to the effect the reimposition of must carry will have on other Commission rules. The Commission rightfully expresses concern about the situation where a cable system is simultaneously required to carry a station under the 1992 Act and to delete a portion of its programming pursuant to the Commission's exclusivity rules. This phenomenon could occur quite frequently, as a commercial station's new must carry zone (i.e., its ADI) may far exceed the territory in which it is automatically exempted from exclusivity blackouts.^{30/}

^{30/} That territory is defined by a combination of grade B contours, significantly viewed status, and 35/55 mile zones.

One option for the Commission to consider would be to eliminate the program exclusivity rules altogether. The program exclusivity rules function largely as an inducement for cable operators to carry certain stations (those with local exclusivity rights) over distant signals. Now that must carry has been reimposed, the justification for retaining the program exclusivity rules is less clear.^{31/}

A less drastic step the Commission should undertake to resolve the particular concern raised in the NPRM would be to add a new exemption to the program exclusivity rules. Under the new exemption, no television station would be deleted in any area in which it could invoke must carry (even if it actually elected retransmission consent). Thus, for a commercial station, the exemption would apply to any system located within its ADI. For NCE stations, the 50-mile/grade B zone would apply.

P. The Commission Should Update Its List
Of Top 100 Markets

Congress has directed that the Commission update the list of the top 100 markets codified at Section 76.51 of its rules. This list has no direct bearing on the new must carry

^{31/} The need for review is even more compelling in the case of stations invoking retransmission consent. The possible ramifications of combining retransmission consent and program exclusivity obviously were not considered by the Commission when it adopted its program exclusivity rules.

regime, which focuses instead on current ADI designations. It is still used, however, for purposes of the FCC's program exclusivity regulations and in assessing a system's copyright status under 17 U.S.C. § 111.^{32/}

TCI submits that the Section 76.51 list should be updated to reflect changes during the past two decades. The update should then apply to the existing program exclusivity rules (to the extent they remain) and copyright calculations. There may be some dispute as to whether this update can affect copyright, which is based on the "Rules, Regulations and Authorizations of the Federal Communications Commission in affect on April 15, 1976." The FCC, for its part, should state that cable systems and their subscribers should be able to take advantage of these market changes. If Congress had not wanted this to be the case, there would have been little reason to suggest an update of the Section 76.51 list. At the same time, any favorable copyright treatment based on the original Section 76.51 list should be "grandfathered." Such treatment has been permitted in the past to avoid service disruption.^{33/}

^{32/} The royalty fees paid by a larger cable system depend today in large part on its market assignment under Section 76.51. Systems in "major" markets can generally import more "distant" signals at a favorable rate than can similar systems in "smaller" markets. The variation traces back to the different distant signal quotas assigned to these systems under the Commission's old signal carriage regulations.

^{33/} Copyright Office's Policy Decision on Cable License.

II. RETRANSMISSION CONSENT

As noted earlier, TCI strongly opposes retransmission consent. TCI offers these Comments only to assist the Commission fulfill its statutory obligation. In no event should participation in this proceeding be construed as an endorsement or acceptance of paying broadcasters for retransmission consent.

Retransmission consent has the potential for imposing great disruption to cable television and its delivery of broadcast signals to the public. That disruption cannot be contained by cable operators alone. The Commission's rules must attempt to minimize the likelihood and severity of any adverse consequences. For that reason, adoption of an implementation schedule coordinating both retransmission consent and must carry is particularly important.

A. Cable Operators Are Not Required To Reach A Carriage Agreement With Stations Invoking Retransmission Consent

The Commission should clarify that a broadcaster intent on extracting compensation for the carriage of its signal does so at its own risk.^{34/} Under the new Act, a cable operator is under absolutely no obligation to accede to a broadcaster's demand. It

^{34/} Indeed, some signals invoking retransmission consent may end up paying cable systems for carriage. The statutory ban on broadcasters paying for carriage applies only to stations electing must carry. 47 U.S.C. § 534(b)(10).

makes no difference whether the broadcaster is "local" or "distant." Nor does it matter whether the demand is large or small, or whether it is for payment, barter, or some other form of consideration.

To avoid any possible confusion, the Commission should expressly preempt any laws, regulations, or franchise agreements which would otherwise compel a cable operator to carry a broadcast station invoking retransmission consent. It would be patently unfair to allow a third party broadcaster to take advantage of that situation by extracting compensation from a cable operator.^{35/}

B. Retransmission Consent Must Be Distinguished From Copyright, And Broadcasters, Not Programmers, Must Control Its Exercise

The purported rationale for retransmission consent is that it governs cable carriage of the broadcast signal, not the individual programs included in that signal.^{36/} For the latter, cable operators must continue to look to the compulsory copyright license created under Section 111 of the 1976 Copyright Act.

^{35/} TCI fears that compliance with must carry and retransmission consent will aggravate and confuse local franchising authorities. The Commission must do whatever it can to assist cable operators in this regard.

^{36/} See S. Rep. at 36. (The Committee is careful to distinguish between the authority granted broadcasters . . . to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal.")

It is far from clear that the distinction between retransmission consent and copyright can be maintained. Indeed, many members of Congress expressed concern over the issue during floor debate.^{37/} TCI's own assessment is that retransmission consent is really copyright by another name. As such, it is redundant and irreconcilable with the carriage rights conveyed under Section 111. But if the Commission is to have any hope of fashioning operative regulations, it must clearly distinguish between retransmission consent and copyright. Retransmission consent was intended, and should remain, the province of broadcasters, not programmers.^{38/}

Retransmission consent is a newly created federal scheme, defined by statute and Commission regulation. The Commission is free to define retransmission consent as a broadcast prerogative that cannot be compromised through private contract.^{39/}

^{37/} Cites

^{38/} See Monroe County Bd. of Commissioners, 72 F.C.C.2d 683 (1979) ("All that is required by Section 325(a) is that consent be obtained from the originating station. Neither the statute nor our rules require the consent by anyone else To construe Section 325(a) to require the consent of each program syndicator on a program by program basis would effectively read into the Act a requirement not imposed by Congress); Blair Broadcasting of California, Inc., 48 R.R.2d 1551 (1981).

^{39/} Programmers are, of course, entitled to consider the proceeds broadcasters may secure from retransmission consent in establishing initial licensing fees.

C. All Multichannel Video Programming
Distributors Must Be Equally Subject
To Retransmission Consent

Much of the 1992 Cable Act is purportedly directed towards creating a level playing field for multichannel video programming distributors. It is somewhat surprising, therefore, that the NPRM raises the possibility that all such distributors might not be similarly subject to retransmission consent. Section 6 plainly states that "no cable system or other multichannel video programming distributors shall retransmit the signal of a broadcast station . . . except . . . with the express authority of the originating station." Given this statutory language, and the overarching goals of the 1992 Cable Act, it is quite clear that all multichannel video programming distributors, including SMATV, wireless cable, and DBS operators, are subject to retransmission consent. Any regulations adopted should be framed to apply equally to non-cable multichannel video programming distributors. The fact that these entities may have different copyright authority is irrelevant for purposes of administering retransmission consent.^{40/} As explained in the preceding section, copyright and retransmission consent must be handled as separate matters.

^{40/} TCI does not object to the proposal in the NPRM that the burden of securing retransmission consent "should fall on the entity directly selling programming and interacting with the public," rather than on the licensee of any leased facilities.

D. Only Television Broadcast Stations
Can Exercise Retransmission Consent

The NPRM asks whether retransmission consent applies to radio, as well as television. It notes that Section 6 initially addresses the retransmission of "a broadcast station" without expressly limiting itself to television. The notion that Section 6 somehow encompasses radio must be emphatically rejected. The suggestion in the NPRM that "[i]t is not evident from the legislative history and from the context in which the 1992 Act was adopted whether Congress intended to apply the retransmission provisions to signals other than television signals" is simply wrong. Congress clearly had no such intention. If the statute is less than precise, it is only because the drafters lacked any reason to suspect that the provision would be subject to such a tortured construction.

The legislative history of the 1992 Cable Act is replete with references to retransmission consent in the television context, without any mention of radio. Moreover, the structure of Section 6, including its explicit instruction to the Commission to develop regulations governing the exercise of retransmission consent by "television broadcast stations," makes no sense if the Section were intended to also encompass radio. It simply is not credible that Congress intended Section 6 to govern radio, without including any discussion of how retransmission consent should apply to that medium.^{41/}

^{41/} The Commission should also clarify that neither must carry nor retransmission consent apply to foreign (e.g., Mexican

E. Only "Originating" Stations, Not
Translators, Can Invoke Retransmission
Consent

Although the NPRM does not raise the issue, the Commission must clarify which television broadcast stations are entitled to invoke retransmission consent. The statute seems to require prior consent for the retransmission of any broadcast signal -- including a translator station. The more difficult question is who grants the retransmission consent in the case of a translator station. The statute requires multichannel video distributors to secure "the express authority of the originating station." (emphasis added). TCI submits that the "originating station" in this context should be defined as the parent station that makes the first broadcast of the signal. Translator stations would be excluded by that definition. Accordingly, if a multichannel video distributor intends to retransmit a translator station, it should turn to the primary station, not the translator, to secure retransmission consent.

[Footnote Continued]

or Canadian) signals. Congress' concern in adopting both provisions was clearly limited to domestic broadcasters.

F. Every "Local" Broadcast Signal Carried,
Including A Station Carried
Pursuant To Retransmission Consent,
Should Count Towards A Cable System's
Must Carry Quota

TCI fully supports the Commission's tentative conclusion that signals carried pursuant to retransmission consent (but which were otherwise eligible for must carry) should count towards a system's must carry quota. That conclusion is consistent with Congressional intent. The Senate Report states, "[T]he Committee intends that stations which exercise their retransmission rights and are carried by cable systems will be counted towards the total number of stations required to be carried under Sections 614 and 615." S. Rep. at 84.

The quota approach was adopted to minimize the intrusion on a cable operator's editorial discretion. The balance Congress sought to achieve through the "one-third" quota would be quickly eviscerated if the stations an operator would normally use to satisfy its must carry quota elected retransmission consent and could not count towards fulfilling the must carry quota.

The result of such an interpretation would be ludicrous. Assuming all the stations cable operators want to carry elect retransmission consent, cable operators could be required to devote substantially more than one third of their channel capacity for the carriage of commercial broadcast stations.^{42/}

^{42/} The same problem would occur in cases where a cable operator voluntarily carries a station that initially elects must

The FCC must avoid that result.

G. Broadcast Stations Electing Retransmission
Consent Should Be Allowed To Negotiate
Over Ancillary Carriage Terms, Including
Those Terms That Are Non-Negotiable In The
Must Carry Context

TCI also supports the Commission's tentative conclusion that parties engaged in retransmission consent discussions should be free to negotiate over all carriage terms. The premise underlying retransmission consent (as opposed to must carry) is that the cable operator can reject a broadcaster's compensation demands and not carry that particular station at all. Logic suggests that the parties should have the implied "lesser" right to negotiate over "partial" carriage.

Must carry artificially imposes a variety of ancillary carriage terms on cable operators. In the "free-market" world of retransmission consent, all those terms should be subject to negotiation. Parties should be free to fashion a carriage arrangement that makes sense for them. In particular, they should be allowed to reach a carriage agreement for a portion of the broadcast day. The language of Section 6 expressly recognizes this carriage possibility, by specifying that

[Footnote Continued]

carry, but then refuses to pay the related copyright and signal quality costs. Carriage of these stations should count towards the must carry quota, even though, strictly speaking, they do not qualify for must carry.

retransmission consent shall govern carriage of "a broadcast station, or any part thereof."^{43/}

The NPRM at one point assumes that a retransmission consent signal counts toward the must carry quota and that a cable operator can carry a portion of a retransmission consent signal. It then asks how that partial carriage should count towards meeting quota obligations. As the station at issue has voluntarily surrendered its must carry rights in exchange for retransmission consent, it follows that any subsequently negotiated carriage, regardless of the broadcast time involved, should count as a full quota signal.^{44/}

^{43/} The NPRM expresses concern as to how "partial" carriage pursuant to retransmission consent should be reconciled with copyright laws, which require payment for carriage of the full signal even if the entire program schedule is not carried. The concern is misplaced because the dichotomy already exists under the current (non-must carry) regulatory environment. Cable operators today are free to carry a portion of a station's broadcast day, provided they make full copyright payment. The introduction of retransmission consent will not in any way change or complicate this practice and, thus, no special Commission action is required.

^{44/} Consistent with the general flexibility surrounding the operation of retransmission consent, negotiating parties should be allowed to enter into binding agreements extending beyond the initial three year election period.

H. The Commission Should Not Subject Parties
Engaged In Retransmission Consent Negotiations
To Mandatory Arbitration

The NPRM cites references in the Senate Report to the Commission imposing arbitration requirements to ensure continued cable carriage of particular broadcast signals. That suggestion was obviously inserted into the legislative record to placate those who feared the disruptive impact of retransmission consent. But no arbitration requirement was included in the statute, and the Commission should resist the invitation to impose it now. Mandatory arbitration would dramatically skew the entire negotiating process. Individual parties may, of course, decide together to resort to mandatory arbitration, but the Commission should not unilaterally and uniformly impose that requirement.

I. Retransmission Consent Agreements Should Be
Formal And Subject To Judicial Review

TCI supports the suggestion in the NPRM that retransmission agreements be reduced to writing. That simple requirement will go a long way towards minimizing future misunderstandings. The written agreements should include a statement to the effect that the broadcaster is conveying "retransmission consent, pursuant to 47 U.S.C. 325." But other than that "magic" language, the parties should be free to draft an agreement to their own liking. When interpretive disputes do arise, they should be handled as conventional contract matters to be resolved by the courts, rather than the FCC.^{45/}

^{45/} Moreover, the Commission should immunize cable operators from any liability arising from a good faith reliance on a purported grant of retransmission consent.

J. Stations Electing Retransmission
Consent Cannot Interfere With
The Rights Of Must Carry Stations

The NPRM asks how the Commission should address the potential for conflicts between stations electing retransmission consent rights and must carry. It notes, in particular, the language of Section 325(b) and the Conference Report which appear to give "must carry" stations priority with regard to channel positioning. The matter is really just a subset of the channel positioning issue discussed above. The fact that "retransmission consent" stations may also make channel positioning requests is no reason to stray from the recommended approach giving cable operators the sole authority to independently resolve conflicting demands. For purposes of channel positioning, stations invoking retransmission consent are no different than any other non-must carry programmer. Their requests can be considered only after the requests of must carry stations have been addressed.

K. A Broadcaster's Election Decision
Must Be Binding

The NPRM raises the possibility that stations sometimes be allowed an interim change in their election decision between must carry and retransmission consent. The NPRM specifically considers a situation similar, but not identical, to one raised in the Senate Report. It concerns a station that initially elects must carry, and is carried on the cable system, but not pursuant to that request (presumably because the system's must carry quota is already full).

As a general rule, interim election changes should be prohibited; they can only add confusion to an already confusing situation. In this case, the fact that a system voluntarily carries a station that was initially willing to be carried pursuant to a non-compensatory must carry arrangement is hardly cause to extend the station the right to reverse its initial election and suddenly seek compensation for carriage. The cable operator would then need to reevaluate whether it wants to continue carriage of that station and whether it should change its list of stations officially carried pursuant to must carry. A vicious cycle would quickly begin that might be difficult to break. Worse still, there is no off-setting policy justification for allowing the election change in the first place.^{46/} Given the plain language of the statute, the Commission should ignore any contrary suggestion in the Senate Report and require each station to stick to its initial election decision until the three year term expires.^{47/}

^{46/} The Commission's discussion in the NPRM seems premised on an unspoken fear that a failure to provide broadcasters with election flexibility will somehow allow cable operators to manipulate the statutory scheme. The concern is more imagined than real.

^{47/} Of course, if a station elects must carry to no avail (because the station's quota is already full), the prohibition on carriage payments should not apply. The disappointed broadcaster should be allowed to compensate the cable operator for carriage.

L. A Merger of Two Formerly Separate
Cable Systems Or A Change In Market
Designation May Sometimes Justify
Extending A Broadcaster The Right
To Make A New Election Decision

TCI has identified just two situations where enforcing a broadcaster's initial decision would be sufficiently awkward to justify a new election. The first situation involves a change in a system's technical integration. As already explained, a broadcaster should be required to make a single election with regard to each technically integrated cable system. When two separate systems, one subject to must carry and the other subject to retransmission consent, become technically integrated, that mandate is immediately violated. In most instances, there will be no adverse consequences from the integration, and no change in election should be permitted. However, if the cable operator faces a must carry obligation in part of the system and previously had been unable to reach a retransmission consent agreement for the rest of the system, the operator should have the right to insist the broadcaster make a uniform election.

The second situation involves a change in a system's market designation. If the change puts a system in a broadcaster's must carry zone for the first time, the broadcaster should have the option of invoking must carry.^{48/} An ample

^{48/} This action would not, strictly speaking, be a change in election, because the broadcaster previously did not have the option of making the election.

transition period should be provided for notification, election, negotiation, and implementation.

M. Commission Regulations Should Include An
Implementation Schedule For Must Carry
And Retransmission Consent

As already noted, the initial implementation of must carry and retransmission consent poses the risk of significant disruptions to signal carriage and viewing continuity. Commission regulation should be fashioned to minimize the transition burden on all of the parties involved, including cable subscribers. This can best be accomplished by adopting a coordinated schedule, so that any necessary carriage changes can be made at a single point in time. The ability to make these changes all at once will facilitate orderly planning and reduce the level of subscriber confusion.

The Commission should require television stations to elect between must carry and retransmission consent well before either goes into effect.^{49/} To minimize disruption, the implementation for both must carry and retransmission consent should be set at October 5, 1993.^{50/} The implementing regulations must,

^{49/} The Act also gives the Commission the right to adopt regulations that require the election to be made within one year of enactment. The Commission has full authority, in the interests of administrative harmony, convenience and necessity, to require that the election be made earlier than the expiration of the one-year period.

^{50/} The Commission's obligation to adopt must carry regulations by April 3 does not mean that the regulations must, or can,

of course, provide sufficient time to analyze and respond to various issues. It must also give the cable operator ample time to implement necessary changes and notification prior to October 5. Given the tight time schedule, the regulations should also include incentives and penalties to encourage adherence to the specified schedule.

TCI suggests the following schedule:^{51/}

Monday, May 3: Commercial and noncommercial stations electing must carry status must provide written notification to cable operators. The initial must carry notice should specify the particular systems involved. It should also include full documentation as to must carry eligibility and any requests regarding channel positioning. If no notice is received, cable operators should assume the station has elected retransmission consent.

[Footnote Continued]

go into effect at that date. A six month transition period is both reasonable and appropriate to accommodate the changes implementation of the rules will help bring about.

^{51/} This schedule gives each party several weeks to respond at each step. The Commission should supplement the schedule with instructions to both broadcasters and cable operators to cooperate in interim exchanges of information that will fairly allow each party to honor its obligations under the schedule. For example, if a broadcaster is unable to determine whether a particular system lies inside or outside its ADI, the cable operator should provide this information in time for the broadcaster to determine whether it can invoke must carry by the May 3 deadline.